

Filed for intro on 02/02/95
House Bill _____
By _____

Senate No. SB0729
By Cooper

AN ACT to enact the "Tennessee Continuing Care Provider Act".

WHEREAS, The general assembly recognizes that continuing care communities have become an important and necessary alternative for the long-term residential, social and health maintenance needs for many of Tennessee's mature citizens; and

WHEREAS, The general assembly finds and declares that tragic consequences can result to citizens of Tennessee when a provider of services under a continuing care agreement becomes insolvent or unable to provide responsible care. The general assembly recognizes the need for full disclosure with respect to the terms of agreements between prospective residents and the provider and of the operations of such providers. Accordingly, the general assembly has determined that these providers should be regulated in accordance with the provisions of this act. The provisions of this act apply equally to for-profit and not-for-profit provider organizations. The provisions of this act shall be the minimum requirements to be imposed upon any person, association or organization offering or providing continuing care as set forth in this act; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act shall be known and may be cited as the "Tennessee Continuing Care Provider Act".

SECTION 2. As used in this act, unless the context otherwise requires:

(1) "Commissioner" means the commissioner of the department of commerce and insurance; and

(2) "Life Care Contract" means a contract to provide to a person for the duration of such person's life or for a term in excess of one (1) year, nursing services, medical services, or health-related services, board and lodging and care as necessary, or in any combination of such services for such person in a facility, which is conditioned upon the transfer of property. Such transfer may include a payment of an entrance fee to the provider of such services or the payment of periodic charges for the care and service involved, or both such payments, and includes continuing care agreements.

SECTION 3.

(a) Prior to the execution of a contract to provide continuing care or at the time or prior to the transfer of any money or other property to a provider by or on behalf of a prospective resident, whichever occurs first, the provider, and manager, if any, shall deliver a disclosure statement to the person with whom the contract is to be entered into, which shall contain all of the following information unless such information is in the contract, a copy of which must be attached to the statement:

(1) The names and business addresses of the provider and manager and a statement of whether the provider and manager conduct business in the form of a partnership, corporation, or other type of legal entity.

(2) The names and business addresses of the officers, directors, trustees, managing or general partners, and any person having a ten percent (10%) or greater equity or beneficial interest in the provider or manager and a description of such person's interest in and/or occupation with the provider.

(3) With respect to:

(A) The provider;

(B) Any person named in response to subdivision (2);

(C) The proposed manager, if the facility will be managed by a person or entity other than an individual employed directly by the provider:

(i) A description of the business experience of such persons named in subsection (2), if any, in the operation or management of similar facilities.

(ii) The name and address of any professional service, firm, association, trust, partnership or corporation in which such person has, or which has in such person, a ten percent (10%) or greater interest and which it is presently intended will or may provide goods, leases or services to the facility of a value of five hundred dollars (\$500) or more, within any year, including:

(a) A description of the goods, leases or services and the probable or anticipated cost thereof to the facility or provider.

(b) The process by which the contract was awarded.

(c) Any additional offers that were received.

(iii) The amount each person named in paragraph 2 has received or been paid by, or as a result of any contact, connection, or arrangement with the provider, manager, or any entity identified in subdivision (ii).

The commissioner may request additional information, detailing why a contract was awarded, as may be necessary.

(iv) A description of any matter in which such a person:

(a) Has been convicted of a felony or pleaded nolo contendere to a felony charge or been held liable or enjoined in a civil action by final judgment if the felony or civil action involved fraud, embezzlement, fraudulent conversion or misappropriation of property; or

(b) Is subject to a currently effective injunction or restraining order of a court of record, or within the past five (5) years had any state or federal license or permit suspended or revoked as a result of an action brought by a governmental agency or department, arising out of or relating to business activity or health care, including, without limitation, actions affecting a license to operate a foster care facility, nursing home, retirement home, home for the aged or facility in any state.

(4) A statement as to:

(A) Whether the provider is or ever has been affiliated with a religious, charitable or other nonprofit organization;

(B) The nature of the affiliation, if any;

(C) The extent to which the affiliate organization will be responsible for the financial and contract obligations of the provider; and

(D) Any amounts the religious, charitable or other nonprofit organizations has received or expects to receive by virtue of any type of affiliation or sponsorship.

(5) The location and description of the physical property or properties of the facility, existing or proposed, and, to the extent proposed, the estimated completion date or dates, whether or not construction has begun and the contingencies subject to which construction may be deferred.

(6) The services provided or proposed to be provided under contracts for continuing care at the facility, including the extent to which medical care is furnished. The disclosure statement shall clearly state which services are included in contract for continuing care and which services are made available at or by the facility at extra charge.

(7) A description of all fees required of residents, including the entrance fee and periodic charges or maintenance fees, if any. The description shall include the manner by which the provider may adjust periodic charges or other recurring fees and the limitations on such adjustments, if any. If the facility is already in operation or if the provider or manager operates one (1) or more similar facilities within the United States, there shall be included tables showing the frequency, average dollar amount and percentage of each increase in periodic rates at each such facility for the period that the facility has been in operation.

(8) The provisions that have been made or will be made, if any, to provide reserve funding or security to enable the provider to fully perform its obligations under contracts to provide continuing care at the facility, including the establishment of escrow accounts, trust or reserve funds, together with the manner in which such funds will be invested and the names and experience of persons who will make or participate in investment decisions.

(9) Audited financial statements of the provider and manager, including all notes, reports, opinions and supplementary financial information contained in any

such financial statements audited or reviewed by the provider's certified public accountants.

(10) A full and complete copy of all contracts between the provider and any manager together with a summary of all fees, reimbursements, remuneration and/or compensation of any type or nature that were paid to any manager for the preceding five (5) years.

(11) If operation of the facility has not yet commenced, a statement of the anticipated source and application of the funds used or to be used in the purchase or construction of the facility, including:

(A) An estimate of the cost of purchasing or constructing and equipping the facility including such related costs as financing expense, legal expense, land costs, occupancy development costs and all other similar costs which the provider expects to incur or become obligated for prior to the commencement of operations;

(B) A description of any mortgage loan or other long-term financing intended to be used for the financing of the facility, including the anticipated terms and costs of such financing;

(C) An estimate of the total entrance fees to be received from or on behalf of residents at or prior to commencement of operation of the facility;

(D) An estimate of the funds, if any, which are anticipated to be necessary to fund start-up losses and the provisions for adequate reserve funds to assure full performance of the obligations of the provider under contracts for the provision of continuing care;

(E) A projection of estimated income from fees and charges other than entrance fees together with the sources of such income, showing

individual rates presently anticipated to be charged and including a description of the assumptions used for calculating the estimated occupancy rate of the facility and the effect on the income of the facility of government subsidies for health care services, if any, to be provided pursuant to the contracts for continuing care;

(F) A projection of estimated operating expenses of the facility, including a description of the assumptions used in calculating the expenses and separate allowances, if any, for the replacement of equipment and furnishings and anticipated major structural repairs or additions;

(G) Identification of any assets pledged as collateral for any purpose; and

(H) An estimate of annual payments of principal and interest required by any mortgage loan or other long-term financing.

(12) Such other material information concerning the facility or the provider as may be required by the department or as the provider wishes to include.

(13) The cover page of the disclosure statement shall state, in a prominent location and type face, the date of the disclosure statement and that the issuance of a certificate of authority does not constitute approval, recommendation or endorsement of the facility by the department, nor is it evidence of, nor does it attest to, the accuracy or completeness of the information set out in the disclosure statement.

(14) A copy of the standard form or forms of contract for continuing care used by the provider shall be attached as an exhibit to each disclosure statement.

(b) The provider and manager shall file with the commissioner, annually within four (4) months following the end of the provider's fiscal year, an annual disclosure statement which shall contain the information required by this act for the initial disclosure statement. The annual disclosure statement shall also be accompanied by a narrative fully describing any material differences between:

(1) The pro forma income statements filed pursuant to this act either as part of the application for registration or as part of the most recent annual disclosure statement.

(2) The actual results of operations during the fiscal year.

The annual disclosure statement shall also contain a revised pro forma income statement for the next fiscal year. The department may, in its discretion, request additional income statements or financial information.

(c) From the date an annual disclosure statement is filed until the date the next succeeding annual disclosure statement is filed with the commissioner and prior to the provider's acceptance of part or all of any application fee or part of the entrance fee or the execution of the continuing care agreement by the resident, whichever first occurs, the provider shall deliver the current annual disclosure statement to the individual or individuals who are current or prospective residents and with whom the continuing care agreement is or may be entered into.

(d) In addition to filing the annual disclosure statement, the provider shall amend its currently filed disclosure statement at any other time if an amendment is necessary to prevent the disclosure statement and annual disclosure statement from containing any material misstatement of fact or omission to state a material fact required to be stated therein. Any such amendment or amended disclosure statement must be filed with the commissioner at or before the time it is delivered to any resident or prospective resident

and is subject to all the requirements of this act, including those as to content and delivery.

SECTION 4.

(a) No provider shall make, publish, disseminate, circulate or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated or placed before the public, in a newspaper or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement of any sort containing any assertion, representation or statement which is untrue, deceptive or misleading.

(b) No provider shall file with the department or make, publish, disseminate, circulate or deliver to any person or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated or delivered to any person or placed before the public, any financial statement which does not accurately state its true financial condition.

SECTION 5.

(a) In addition to such other provisions as may be considered proper to effectuate the purpose of any continuing care agreement, each agreement executed on and after the date of the adoption of the rules under this act shall be written in nontechnical language easily understood by a layperson and shall:

(1) Provide for the continuing care of one resident, or for two (2) or more persons occupying space designed for multiple occupancy, under appropriate procedures established by the provider and shall show the value of all property transferred, including donations, subscriptions, fees and any other amounts paid or payable by, or on behalf of, the resident or residents.

(2) Specify all services which are to be provided by the provider to each resident including, in detail, all times which each resident will receive and

whether the items will be provided for a designated time period or for life and the average annual cost to the provider of providing the care. Such items may include, but not be limited to, food, shelter, nursing care, drugs, burial and incidentals.

(3) Describe the health and financial conditions upon which the provider may have the resident relinquish his space in the designated facility.

(4) Describe the health and financial conditions required for a person to continue as a resident.

(5) Describe the circumstances under which the resident will be permitted to remain in the facility in the event of financial difficulties of the resident.

(6) State the fees that will be charged if the resident marries while at the designated facility, the terms concerning the entry of a spouse to the facility and the consequences if the spouse does not meet the requirements for entry.

(7) Provide in clear and understandable language, in print no smaller than the largest type used in the body of said agreement, the terms governing the refund of any portion of the entrance fee.

(8) State the terms under which an agreement is canceled by the death of the resident. The agreement may contain a provision to the effect that, upon the death of the resident, the moneys paid for the continuing care of such resident shall be considered earned and become the property of the provider.

(9) Provide for advance notice to the resident, of not less than ninety (90) days, before any change in fees or charges or the scope of care or services may be effective, except for changes required by state or federal assistance programs.

(10) Provide that charges for care paid in one (1) lump sum shall not be increased or changed during the duration of the agreed upon care, except for changes required by state or federal assistance programs.

(b) A resident shall have the right to rescind a continuing care agreement, without penalty or forfeiture, within ninety (90) days after making an initial deposit or executing the agreement. A resident shall not be required to move into the facility designated in the agreement before the expiration of the ninety (90) day period.

(c) If a resident dies before occupancy date, or through illness, injury or incapacity is precluded from becoming a resident under the terms of the continuing care agreement, the agreement is automatically rescinded and the resident or his legal representative shall receive a full refund of all moneys paid to the facility, except those costs specifically incurred by the facility at the request of the resident and set forth in writing in a separate addendum, signed by both parties to the agreement.

(d) No agreement for care shall permit dismissal or discharge of the resident from the facility providing care prior to the expiration of the agreement, without just cause for such a removal. "Just cause" shall include, but not be limited to, a good faith determination evidenced by a writing, signed by the provider, manager and the resident's personal physician or a physician who has examined the resident if the resident has no personal provider, that a resident is a danger to himself or others while remaining in the facility. If a facility dismisses a resident for just cause, the facility shall pay to the resident any refund due in the same manner as if the resident's agreement was terminated pursuant to this act and shall allow the resident a reasonable period of time to secure alternate care facilities. In no event, however, shall any such refund be less than the refund or reversionary interest, if any, payable or refundable upon the resident's death.

(e) No act, agreement or statement of any resident, or of an individual purchasing care for a resident under any agreement to furnish care to the resident, shall constitute a valid waiver of any provision of this act intended for the benefit or protection of the resident or the individual purchasing care for the resident.

(f) Those agreements entered into prior to the effective date of this act or prior to the issuance of a certificate of authority to the provider shall be valid and binding upon both parties except that the provision of this act shall also apply thereto.

SECTION 6.

(a) Residents living in any continuing care facility in this state shall have the right of self-organization.

(b) The board of directors, a designated representative or other such governing body of a continuing care facility shall hold quarterly meetings with the residents of the continuing care facility for the purpose of free discussion of subjects which may include income, expenditures and financial matters as they apply to the facility and proposed changes in policies, programs and services. Residents shall be entitled to at least fourteen (14) days notice of each quarterly meeting.

SECTION 7.

(a) No resident of a continuing care facility shall be deprived of any civil or legal rights, benefits, or privileges guaranteed by law, the constitution of the state of Tennessee, or the constitution of the United States solely by reason of status as a resident of a facility. Every resident of a facility shall have the right to:

(1) Live in a safe and decent living environment, free from abuse and neglect.

(2) Be treated with consideration and respect and with due recognition of personal dignity, individuality, and the need for privacy.

(3) Retain and use his own clothes and other personal property in his immediate living quarters, so as to maintain individuality and personal dignity, except when the facility can demonstrate that such would be unsafe, impractical or an infringement upon the rights of other residents.

(4) Unrestricted private communication, including receiving and sending unopened correspondence, access to a telephone, and visiting with any person of his choice, at any time between the hours of 9 a.m. and 9 p.m. at a minimum.

(5) Freedom to participate in and benefit from community services and activities and to achieve the highest possible level of independence, autonomy, and interaction within the community.

(6) Manage his own financial affairs unless he or his guardian authorizes the administrator of the facility to provide safekeeping for funds.

(7) Share a room with his spouse if both are residents of the facility.

(8) Reasonable opportunity for regular exercise several times a week and to be outdoors at regular and frequent intervals.

(9) Exercise civil and religious liberties, including the right to independent personal decisions. No religious beliefs or practices, nor any attendance at religious services, shall be imposed upon any resident.

(10) Access to adequate and appropriate health care consistent with established and recognized standards within the community.

(11) At least ninety (90) days, notice of relocation or termination of residency from the facility unless, for medical reasons, the resident is certified by a physician to require an emergency relocation to a facility providing a more skilled level of care. In the case of a resident who has been adjudicated mentally incompetent, the guardian shall be given at least ninety (90) days notice of a

non-emergency relocation or residency termination. Reasons for relocation shall be set forth in writing.

(12) Present grievances and recommend changes in policies, procedures, and services to the staff of the facility, governing officials, or any other person without restraint, interference, coercion, discrimination, or reprisal. This right includes the right to be a member of, to be active in, and to associate with advocacy or special interest groups.

(b) The administrator and manager of a facility shall ensure that a written notice of the rights, obligations, and prohibitions set forth in this part is posted in a prominent place in each facility and read or explained to residents who cannot read.

(c) In order to determine whether the facility is adequately protecting residents' rights, the annual inspection of the facility shall include private informal conversations with a sample of residents to discuss residents' experiences within the facility with respect to rights specified in this section and general compliance with standards.

(d) The facility or manager shall not hamper or prevent residents from exercising their rights as specified in this section.

(e) No facility, employee or agent of a facility may serve notice upon a resident to leave the premises or take any other retaliatory action against any person who:

(1) Exercises any right set forth in this section.

(2) Appears as a witness in any judicial or administrative proceeding.

(3) Files a civil action alleging a violation of the provisions of this part or notifies a state attorney or the attorney general of a possible violation of such provisions.

(f) Any facility which terminates the residency of an individual who participated in activities or asserts rights granted by or specified in this section shall be required to show good cause for such action in a court of competent jurisdiction.

(g) Any person who submits or reports a complaint concerning a suspected violation of the provisions of this part or concerning services and conditions in facilities, or who testifies in any administrative or judicial proceeding arising from such a complaint, shall have immunity from any civil or criminal liability therefor, unless such person has acted in bad faith or with malicious purpose or the court finds that there was a complete absence of a justifiable issue of either law or fact raised by the losing party.

SECTION 8. Any provider desiring to sell or transfer ownership of a continuing care facility shall notify the department ninety (90) days in advance of the completion of such sale or transfer. The commissioner may revoke, after notice and a hearing, upon written findings of fact, the certificate of authority of any provider based upon a substantial change in control or ownership of such provider, which change is found not to be in the best interests of the residents of the facility or facilities owned or controlled by the provider such that the facility or facilities is in the imminent danger of becoming insolvent or that the care of present or prospective residents is threatened thereby.

SECTION 9.

(a) Any person who, as a provider, manager or on behalf of a provider or manager:

(1) enters into a contract for continuing care at a facility which does not have a certificate of authority under this act;

(2) enters into a contract for continuing care at a facility without having first delivered a disclosure statement meeting the requirements of this act to the person contracting for such continuing care; or

(3) enters into a contract for continuing care at a facility with a person who has relied on a disclosure statement which omits a material fact required to be stated therein or necessary in order to make the statements made therein not misleading in light of the circumstances under which they are made;

shall be liable to the person contracting for such continuing care for damages including the repayment of all fees paid to the provider or manager with respect to such person, less the reasonable value of care and lodging provided to the resident prior to discovery of the violation, misstatement or omission or the time the violation, misstatement or omission should reasonably have been discovered, together with interest thereon at the legal rate for judgments, court costs and reasonable attorney fees.

(b) Liability under this section shall exist irrespective of whether the provider or person liable had actual knowledge of the misstatement or omission.

(c) This act shall not limit a liability which may exist by virtue of any other statute or under common law if this act were not in effect.

SECTION 10. Any person or resident whose rights as specified in this act are violated shall have a cause of action against any facility, provider, manager, director, officer, trustee, agent, employee, owner, administrator, or staff responsible for the violation. The action may be brought by the resident or his guardian, or by a person or organization acting on behalf of a resident with the consent of the resident or his guardian, to enforce such rights. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual damages, and punitive damages when malicious, wanton, or willful disregard of the rights of others can be shown. Any plaintiff who prevails in any such action may be entitled to recover reasonable attorney fees, costs of the action, and damages. The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident or to the department.

SECTION 11.

(a) The department may make such public or private investigations within or outside of Tennessee as the commissioner deems necessary to determine whether any person has violated or is about to violate any provision of this act or any rule or order

hereunder, or to aid in the enforcement of this act or in the prescribing of rules and forms hereunder and may publish information concerning any violation of this act or any rule or order hereunder.

(b) For the purpose of any investigation or proceeding under this act, the commissioner or any officer designated by the commissioner may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records which the commissioner deems relevant or material to the inquiry, all of which may be enforced in any court of Tennessee which has appropriate jurisdiction.

SECTION 12. Whenever it appears to the commissioner that any person has engaged in, or is about to engage in, any act or practice constituting a violation of any provision of this act or any rule or order hereunder, the commissioner may:

(1) Issue an order directed at any such person requiring such person to cease and desist from engaging in such act or practice.

(2) Bring an action in any court which has appropriate jurisdiction to enjoin the acts or practices and to enforce compliance with this act or any rule or order hereunder. Upon a proper showing, a permanent or temporary injunction, restraining order or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The commissioner shall not be required to post a bond.

SECTION 13.

(a) Any person who knowingly violates any provision of this act, or any rule or order under this act, shall, for each violation, be guilty of a Class E felony.

(b) The commissioner may refer such evidence as is available concerning violations of this act or of any rule or order hereunder to the attorney general or the

proper county attorney who may, with or without such a reference, institute the appropriate criminal proceedings under this act.

(c) Nothing in this act limits the power of the state to punish any person for any conduct which constitutes a crime under any other statute.

SECTION 14.

(a) The commissioner is authorized to promulgate rules and regulations to effectuate the purposes of this act. All such rules and regulations shall be promulgated in accordance with the provisions of Tennessee Code Annotated, Title 4, Chapter 5.

(b) The commissioner may be reimbursed for any expenses the commissioner reasonably incurs , or by the commissioner's agents, in pursuing its investigative and rehabilitative activities under this act.

SECTION 15. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 16. For the purpose of adopting rules and regulations, this act shall take effect upon becoming law, for all other purposes this act shall take effect January 1, 1995, the public welfare requiring it.